

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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D.E. SHAW LAMINAR PORTFOLIOS,  
LLC, et al.,

Plaintiffs,

v.

ARCHON CORP.,

Defendant.

2:07-CV-01146-PMP-LRL

ORDER

Presently before the Court is Plaintiffs' Motion for Summary Judgment, Entry of Final Judgment, and to Strike Defendant's Mitigation Defense (Doc. #126), filed on March 12, 2010. Defendant filed an Opposition (Doc. #127) on April 5, 2010. Plaintiffs filed a Reply (Doc. #137) on June 8, 2010. Also before the Court is Defendant's Motion for Leave to File Supplement to Opposition to Plaintiffs' Second Motion for Summary Judgment and Entry of Final Judgment (Doc. #139), filed on August 6, 2010. Plaintiffs filed a Response (Doc. #141) on August 12, 2010. Defendant filed a Reply (Doc. #142) on August 18, 2010. This Court held a hearing on this matter on August 3, 2010. (Tr. of Mot. Hr'g (Doc. #72).)

**I. BACKGROUND**

In 1993, Defendant Archon Corp. ("Archon"),<sup>1</sup> a Nevada corporation, issued a class of equity securities designated as Exchangeable Redeemable Preferred Stock ("Exchangeable Preferred Stock" or "EPS"). (Am. Compl. (Doc. #27) ¶¶ 18-19; Ans. (Doc.

<sup>1</sup> Archon previously was named Sahara Gaming Corporation.

#44) ¶¶ 18-19.) Plaintiffs are primarily a variety of hedge funds and money managers who hold EPS. (Am. Compl. ¶¶ 7-16.) From the period of July 1, 2004 to December 31, 2004, Plaintiffs purchased 391,058 EPS shares. (Pls.' Second Mot. for Summ. J. (Doc. #126), Exs. 4, 7.) From the period of January 1, 2005 to June 30, 2005, Plaintiffs purchased 297,487 EPS shares. (Id., Exs. 7, 13.) From the period of July 1, 2005 to December 31, 2005, Plaintiffs purchased 199,641 EPS shares. (Id., Exs. 7-9, 13.) From the period of January 1, 2006 to June 30, 2006, Plaintiffs purchased 794,103 EPS shares. (Id., Exs. 4, 7-9, 13.) From the period of July 1, 2006 to December 31, 2006, Plaintiffs purchased 151,126 EPS shares. (Id., Exs. 5, 7-13.) From the period of January 1, 2007 to June 30, 2007, Plaintiffs purchased 53,700 EPS shares. (Id., Exs. 5-12.) From the period of July 1, 2007 to December 31, 2007, Plaintiffs purchased 212,201 EPS shares. (Id., Exs. 5-7, 10-12.)

The Certificate of Designation of the Exchangeable Redeemable Preferred Stock of Sahara Gaming Corporation ("Certificate") is the contract between Archon and the EPS holders, and details the rights of EPS holders. (Pls.' Second Mot. for Summ. J., Ex. 1.) The Certificate provides, in relevant part:

1. Designation and Rank . . . Shares of the Exchangeable Preferred Stock shall have a liquidation preference of \$2.14 per share plus accrued and unpaid dividends, thereon, subject to Section 7(a).

...

2. Cumulative Dividends Priority.

(a) Payment of Dividends. The holders of record of shares of Exchangeable Preferred Stock shall be entitled to receive, when, as and if declared by the Board of Directors out of funds legally available therefore, cumulative cash dividends at a rate per annum per share (the "Dividend Rate") initially set at 8% of (i) \$2.14 plus (ii) accrued but unpaid dividends as to which a Dividend Payment Date (as defined below) has occurred. Dividends shall accrue from the date of issuance and be payable semi-annually in arrears on the 31st day of March and the 30th day of September in each year . . . commencing on March 31, 1994 (each of such dates a "Dividend Payment Date"); provided, however, that on any or all of the first six Dividend Payment Dates the Company may, at its option, pay dividends on the Exchangeable Preferred Stock, in the form of additional shares of Exchangeable

Preferred Stock at the rate per annum of 0.08 shares of additional Exchangeable Preferred Stock for every share of Exchangeable Preferred Stock entitled to received [sic] a dividend. If all Exchangeable Preferred Stock has not been redeemed prior to the tenth Dividend Payment Date, the Dividend Rate will increase on the tenth Dividend Payment Date to the rate per annum per share of 11% and will thereafter increase by an additional 0.50% per annum per share on each Dividend Payment Date until either the Dividend Rate reaches a rate per annum per share of 16% or the Exchangeable Preferred Stock is redeemed or exchanged by the Company as set forth herein. In no circumstances will the Dividend Rate exceed 16% per annum per share. . . . Dividends on the Exchangeable Preferred Stock shall be fully cumulative and shall accrue (whether or not declared), on a daily basis, from the first day of each Dividend Period; provided, however, that the initial semi-annual dividend payable on March 31, 1994 and the amount of any dividend payable for any other Dividend Period shorter than a full Dividend Period shall be computed on the basis of a 360-day year composed of twelve 30-day months and the actual number of days elapsed in the relevant Dividend Period.

...

### 3. Optional Redemption.

#### (a) General

(i) . . . [T]he shares of Exchangeable Preferred Stock may be redeemed, in whole or in part, at the election of the Company, upon notice as provided in Section 3(b), by resolution of the Board of Directors, . . . at a redemption price equal to the Liquidation Preference.

...

### 7. Liquidation Rights; Priority

. . . [The Liquidation Preference is an amount] per share equal to the sum of (i) \$2.14, plus (ii) an amount equal to all accrued but unpaid dividends for the then current Dividend Period, through the date of liquidation, dissolution, or winding up, plus all prior Dividend Periods, whether or not declared . . .

### (Id.)

Archon elected to make payment in kind dividend payments in lieu of cash on the first six dividend payment dates. (Compl. ¶ 24; Am. Ans. ¶ 24.) After the first six payments, Archon accrued cumulative dividends rather than pay cash. (Compl. ¶ 25; Am. Ans. ¶ 25.) Archon has not, prior to this lawsuit, paid a cash dividend on the EPS. (Compl. ¶ 25; Am. Ans. ¶ 25.) The Certificate provides that dividends accrue to the extent not declared. (Pls.' Second Mot. for Summ. J., Ex. 1.) The EPS dividends were fully cumulative, meaning there is no time limit as to how long they can accrue. (Id.) Dividends

1 were to accrue on the EPS at an increasing dividend rate if not paid. (Id.)

2         Shares of the EPS could be redeemed at any time, at Archon's election, upon  
3 notice and by resolution of Archon's Board of Directors and upon payment of a redemption  
4 price equal to the Liquidation Preference for such shares. (Mot. for Summ. J., Ex. 1.) On  
5 July 31, 2007, Archon issued a Notice of Redemption of Preferred Stock ("Notice"),  
6 indicating it would redeem each outstanding share of EPS for \$5.241 per share, which  
7 Archon claimed included all accrued but unpaid dividends. (Mot. for Summ. J., Ex. 2.)  
8 Archon redeemed the EPS on August 31, 2007 for \$5.241 per share. (Am. Ans. ¶ 25.)  
9 Plaintiffs brought suit in this Court on August 27, 2007 for breach of contract, anticipatory  
10 breach, and declaratory relief, alleging Archon did not properly calculate the EPS dividends  
11 and liquidation preference according to the Certificate's terms.

12         On August 6, 2008, this Court granted partial summary judgment to Plaintiffs,  
13 holding that the Certificate was unambiguous and Plaintiffs' interpretation of the Certificate  
14 which results in compound dividends is correct. (Order (Doc. #80).) This Court also struck  
15 four of Defendant's five affirmative defenses, leaving only the defense of failure to mitigate  
16 which was not challenged by Plaintiffs' Motion. (Id.) On August 22, 2008, Defendant  
17 moved for certification of the August 6, 2008 Order for interlocutory appeal. (Doc. #82.)  
18 On July 16, 2009, Plaintiffs moved for summary judgment on Defendant's remaining  
19 defense and for Entry of Final Judgment. (Doc. #109.) On October 20, 2009, this Court  
20 granted Defendant's Motion for Certification and simultaneously denied Plaintiffs' Motion  
21 for Final Judgment without prejudice. (Doc. #123.) On January 20, 2010, the Ninth Circuit  
22 denied Defendant's Petition for Interlocutory Appeal. (Def.'s Opp'n Mot. for Summ. J.  
23 (Doc. #127), Ex. 4.)

24         Plaintiffs now move for final summary judgment, entry of final judgment, and  
25 prejudgment interest. Plaintiffs also move to strike Defendant's affirmative defense of  
26 failure to mitigate. Defendant contends that this Court's prior order interpreting the

1 Certificate was in error, and in any event, the Certificate does not support Plaintiffs'  
2 calculation of damages.

## 3 **II. LEGAL STANDARD**

4 Summary judgment is appropriate if the pleadings, depositions, answers to  
5 interrogatories and admissions, and affidavits demonstrate “there is no genuine dispute as to  
6 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.  
7 56(a). A fact is “material” if it “might affect the outcome of the suit under the governing  
8 law.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is genuine if  
9 “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”  
10 Id. Where a party fails to offer evidence sufficient to establish an element essential to its  
11 case, no genuine issue of material fact can exist, because “a complete failure of proof  
12 concerning an essential element of the nonmoving party’s case necessarily renders all other  
13 facts immaterial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

14 The party “seeking summary judgment bears the initial responsibility of  
15 informing the district court of the basis for its motion, and identifying those portions of ‘the  
16 pleadings . . .’ which it believes demonstrate the absence of a genuine issue of material  
17 fact.” Id. at 323. The burden then shifts to the non-moving party to go beyond the  
18 pleadings and set forth specific facts demonstrating there is a genuine issue of material fact  
19 for trial. Fairbank v. Wunderman Cato Johnson, 212 F.3d 528, 531 (9th Cir. 2000). The  
20 Court views all evidence in the light most favorable to the non-moving party. County of  
21 Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1154 (9th Cir. 2001).

## 22 **III. DISCUSSION**

### 23 **A. Mitigation of Damages**

24 In Nevada, “a party cannot recover damages for loss that he could have avoided  
25 by reasonable efforts.” Conner v. S. Nev. Paving, Inc., 741 P.2d 800, 801 (Nev. 1987).  
26 However, “[i]f a course of action chosen by a plaintiff in responding to the damage caused

1 him by the defendant was reasonable, the plaintiff can recover despite the existence of  
2 another reasonable course of action that would have avoided further damages.” A.I. Credit  
3 Corp. v. Gohres, 299 F. Supp. 2d 1156, 1162 (D. Nev. 2004).

4 Here, Defendant sets forth the affirmative defense of mitigation, claiming that  
5 Plaintiffs were damaged by their own conduct of acquiring shares after they learned that  
6 Archon was not compounding dividends. This Court previously held that the Certificate  
7 governing the rights of EPS holders was unambiguous and that Plaintiffs’ interpretation of  
8 the formula for calculating dividends was correct. Therefore, it was reasonable for Plaintiffs  
9 to rely on the Certificate when purchasing EPS shares. Additionally, it is unreasonable to  
10 expect Plaintiffs to refrain from relying on an interpretation of the Certificate which this  
11 Court has deemed unambiguous and correct merely because it had notice that Defendant  
12 was interpreting the Certificate incorrectly. Defendant does not raise a genuine issue of  
13 material fact regarding mitigation. Defendant’s mitigation defense is an attempt to re-  
14 litigate this Court’s prior ruling on the calculation of dividend amounts. The Court will  
15 decline to revisit this issue. Therefore, the mitigation defense is unavailable to Defendant.

#### 16 **B. Entry of Final Judgment**

17 In its prior order, this Court held that the Certificate that governs the preferred  
18 stock is unambiguous. This Court also found that Plaintiffs’ interpretation of the formula  
19 for calculating dividends is correct. The dividend amount is calculated by taking the  
20 dividend rate (initially set at 8%) and applying it to the sum of (i) \$2.14 plus (ii) accrued but  
21 unpaid dividends as to which a Dividend Payment Date has occurred. There is no genuine  
22 issue of material fact regarding damages, all that is left is for the Court to determine  
23 damages by: calculating the dividend amounts as set forth above; using this to calculate the  
24 Liquidation Preference ((i) \$2.14, plus (ii) an amount equal to all accrued and unpaid  
25 dividends); calculating the difference between the Liquidation Preference and the amount  
26 tendered by Archon; and multiplying this difference by the number of shares owned by

1 Plaintiffs.

2 Archon elected to make dividend in kind payments for the first six dividend  
3 payments. Beginning with the seventh dividend payment, dividends accrued at a rate of 8%  
4 per annum per share of the sum of (i) \$2.14 plus (ii) accrued but unpaid dividends. On the  
5 tenth Dividend Payment Date the Dividend Rate increased to 11% per annum per share and  
6 increased 0.50% per annum per share every Dividend Payment Date until the Dividend Rate  
7 reached a rate per annum per share of 16%. The table below summarizes the calculations  
8 determining each Dividend Payment amount, the total amount of accrued but unpaid  
9 dividends, and the Liquidation Preference.<sup>2</sup>

10 **Table 1. Dividend Calculations**

11 Dividend Payment Date	12 Dividend Rate	13 Accrued but Unpaid Dividends	14 Dividend Rate multiplied by (\$2.14 plus Accrued but Unpaid Dividends)
15 March 31, 1997	0.08	0	0.0856
16 September 30, 1997	0.08	0.0856	0.0890
17 March 31, 1998	0.08	0.1746	0.0926
18 September 30, 1998	0.08	0.2672	0.0963
19 March 31, 1999	0.11	0.3635	0.1377
20 September 30, 1999	0.115	0.5012	0.1519
21 March 31, 2000	0.12	0.6531	0.1676
22 September 30, 2000	0.125	0.8206	0.1850
23 March 31, 2001	0.13	1.0057	0.2045
24 September 30, 2001	0.135	1.2102	0.2261
25 March 31, 2002	0.14	1.4363	0.2503

26 <sup>2</sup> The August 31, 2007 Dividend calculation was prorated in accordance with section 2(a) of the Certificate, which states, “the amount of any dividend payable for any other Dividend Period shorter than a full Dividend Period shall be computed on the basis of a 360-day year composed of twelve 30-day months and the actual number of days elapsed in the relevant Dividend Period.” (Mot. for Summ. J., Ex. 1.)

September 30, 2002	0.145	1.6866	0.2774
March 31, 2003	0.15	1.9641	0.3078
September 30, 2003	0.155	2.2719	0.3419
March 31, 2004	0.16	2.6138	0.3803
September 30, 2004	0.16	2.9941	0.4107
March 31, 2005	0.16	3.4048	0.4436
September 30, 2005	0.16	3.8484	0.4791
March 31, 2006	0.16	4.3275	0.5174
September 30, 2006	0.16	4.8449	0.5588
March 31, 2007	0.16	5.4037	0.6035
August 31, 2007	0.16	6.0071	0.5431
Total Accrued but Unpaid Dividends on August 31, 2007			\$6.55
Liquidation Preference = \$2.14 + \$6.55 = \$8.69			

The total amount of accrued but unpaid dividends from the relevant period was \$6.55. The Liquidation Preference is calculated by finding the sum of (i) \$2.14, plus (ii) an amount equal to all accrued but unpaid dividends, yielding a Liquidation Preference of \$8.69.

Archon redeemed all EPS at the price of \$5.241 per share on August 31, 2007. The difference between the correct Liquidation Preference and the amount paid by Archon is \$3.449 per share. As of August 31, 2007, (the date of Archon's redemption), Plaintiffs collectively held 2,099,311 shares of EPS, giving rise to damages of \$7,240,523.64.

### **C. Prejudgment Interest**

In diversity actions, the award of prejudgment interest is governed by state law. In re Cardelucci, 285 F.3d 1231, 1235 (9th Cir. 2002). In Nevada, "[t]hree items must be determined to enable the trial court to make an appropriate award of interest: (1) the rate of interest; (2) the time when it commences to run; and (3) the amount of money to which the



rate of interest must be applied.” Kerala Props., Inc. v. Familian, 137 P.3d 1146, 1149 (Nev. 2006) (quotation omitted). In regards to the rate of interest, Nevada Revised Statutes § 99.040(1) provides:

[w]hen there is no express contract in writing fixing a different rate of interest, interest must be allowed at a rate equal to the prime rate at the largest bank in Nevada, as ascertained by the Commissioner of Financial Institutions, on January or July 1, as the case may be, immediately preceding the date of the transaction, plus 2 percent, upon all money from the time it becomes due . . . .

Here, the Certificate does not expressly provide the rate of interest, and therefore § 99.040(1) determines the rate of interest. The table below summarizes the rates of interest<sup>3</sup> from the relevant periods as well as the number of shares purchased in those periods.

**Table 2. Interest Rate Calculations**

Period	Prime Interest Rate	Prime Interest Rate plus two percent	Number of Shares Purchased
July 1, 2004 to December 31, 2004	4.25%	6.25%	391,058
January 1, 2005 to June 30, 2005	5.25%	6.25%	297,487
July 1, 2005 to December 31, 2005	6.25%	8.25%	199,641
January 1, 2006 to June 30, 2006	7.25%	9.25%	794,103
July 1, 2006 to December 31, 2006	8.25%	10.25%	151,126
January 1, 2007 to June 30, 2007	8.25%	10.25%	53,700
July 1, 2007 to December 31, 2007	8.25%	10.25%	212,201

Interest commences to run from August 31, 2007, the date Archon breached the certificate by redeeming the EPS shares for the incorrect amount. The amount of money to which the relevant rates must be applied is determined by multiplying the

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<sup>3</sup> This Court takes judicial notice of the prime interest rate as ascertained by the Commissioner of Financial Institutions. Fed. R. Evid. 201 (Court may take judicial notice of facts that are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”)

1 difference between the amount of the correct Liquidation Preference and what Archon paid  
 2 (\$8.69 - \$5.241 = \$3.449) by the number of shares from the relevant interest period. The  
 3 table below summarizes the relevant interest rates, number of shares purchased during these  
 4 periods, and the amount of money to which the relevant rates must be applied.

5 **Table 3. Amount of Damages to Apply Interest to.**

6 Period	Prime Interest Rate plus two percent	Number of Shares	Damages
7 July 1, 2004 to December 31, 2004	6.25%	391,058	\$1,348,741.78
8 January 1, 2005 to June 30, 2005	7.25%	297,487	\$1,026,032.66
9 July 1, 2005 to December 31, 2005	8.25%	199,641	\$688,561.81
10 January 1, 2006 to June 30, 2006	9.25%	794,103	\$2,738,861.25
11 July 1, 2006 to December 31, 2006	10.25%	151,126	\$521,233.57
12 January 1, 2007 to June 30, 2007	10.25%	53,700	\$185,211.20
13 July 1, 2007 to December 30, 2007	10.25%	212,201	\$731,881.25

14 For the 391,058 EPS shares purchased in the period of July 1, 2004 to December  
 15 31, 2004, interest of 6.25% per annum will be calculated from August 31, 2007 on  
 16 \$1,348,7441.78. For the 297,487 EPS share purchased in the period of January 1, 2005 to  
 17 June 30, 2005, interest of 7.25% per annum will be calculated from August 31, 2007 on  
 18 \$1,026,032.66. For the 199,641 EPS shares purchased in the period of July 1, 2005 to  
 19 December 31, 2005, interest of 8.25% per annum will be calculated from August 31, 2007  
 20 on \$688,561.81. For the 794,103 EPS shares purchased in the period of January 1, 2006 to  
 21 June 30, 2006, interest of 9.25% per annum will be calculated from August 31, 2007 on  
 22 \$2,738,861.25. For the 417,027 EPS shares purchased in the period from July 1, 2006 to  
 23 August 31, 2007, interest of 10.25% per annum will be calculated from August 31, 2007 on  
 24 \$1,438,326.12.

#### 25 **IV. CONCLUSION**

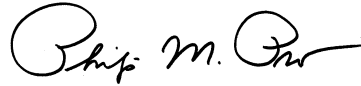
26 IT IS THEREFORE ORDERED that Plaintiffs' Motion for Summary Judgment,

1 Entry of Final Judgment, and to Strike (Doc. #126) is hereby GRANTED.

2 IT IS FURTHER ORDERED that Defendant's Motion for Leave to File  
3 Supplement to Opposition to Plaintiffs' Second Motion for Summary Judgment and Entry of  
4 Final Judgment (Doc. #130) is hereby GRANTED.

5 IT IS FURTHER ORDERED that Judgment is hereby entered in favor of Plaintiff  
6 and against Defendant in the amount of \$7,240,523.64 for damages, \$2,275,055.86 for pre-  
7 Judgment interest, for a total Judgment of \$9,515,579.50.

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9 DATED: December 22, 2010.

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11 PHILIP M. PRO  
12 United States District Judge  
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